

ESTTA Tracking number: **ESTTA617323**

Filing date: **07/23/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92056317
Party	Plaintiff Cockpit USA, Inc.
Correspondence Address	E COOKE RAND RAND ROSENZWEIG RADLEY & GORDON LLP 800 THIRD AVENUE, SUITE 2604 NEW YORK, NY 10022 UNITED STATES ccampbell@randrose.com,erand@randrose.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Catherine S Campbell
Filer's e-mail	ccampbell@randrose.com,erand@randrose.com
Signature	s/cscampbell/
Date	07/23/2014
Attachments	Reply.pdf(320943 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

.....

COCKPIT USA, INC.,

Petitioner,

v.

TOP GUN INTELLECTUAL
PROPERTIES LLC,

Registrant.

Cancellation No. 92056317

Registration No. 2817325

.....

PETITIONER’S REPLY TO REGISTRANT’S OPPOSITION TO
THE MOTION FOR LEAVE TO FILE AN AMENDED PETITION TO CANCEL

Petitioner, Cockpit USA, Inc. (“Petitioner” or “Cockpit”), by its attorneys Rand
Rosenzweig Radley & Gordon LLP, hereby replies to the opposition of Registrant, Top Gun
Intellectual Properties LLC (“Registrant”) to Petitioner’s motion for leave to file an amended
petition to cancel (“Motion”). Petitioner commenced this proceeding for cancellation of
Registrant’s trademark registration of “Top Gun” in international class 25 (the “Mark”), and now
seeks leave to amend its initial petition to reinstate claims of fraud on the USPTO based on false
declarations in the Registrant’s Sections 8 and 15 filings (also referred to herein as the
“Combined Declaration”). Specifically, Petitioner alleges in its proposed amended petition
 (“Amended Petition”; attached as Exhibit 1 to the Motion) that Registrant falsely declared that it
was offering for sale shoes, sandals, sports coats, and jeans at the time it filed its Combined
Declaration and continuously for the five years since registration. Registrant provides no viable
basis for denying Petitioner’s Amended Petition restating these two fraud counts.

Petitioner's Amended Fraud Claims Meet
Both Pleading Standards for Particularity and Plausibility

As Registrant concedes, Fed. R. Civ. P. 15(a)'s proviso that "leave [to amend a pleading] shall be freely given when justice so requires" applies in TTAB proceedings. *See generally* TBMP §507.02; *Iomega Corp. v. Information Technology International Corp.*, 2001 WL 826856 (TTAB) (amendment permitted under Rule 15(a) standard). Petitioner's restated allegations of fraud based on "information and belief" are now accompanied by a statement of facts upon which the belief is founded. *Petróleos Mexicanos v. Intermix S.A.*, 2011 WL 586300 (TTAB 2012); *Meckatzer Löwenbräu Benedikt Weiß KG v. White Gold, LLC*, 2010 WL 2561535 (TTAB). The Amended Petition specifies Petitioner's counsel's personal investigation at the time of preparing the pleadings and clearly shows that contrary to the Combined Declaration's listing of all the goods registered to the Mark, in fact Registrant did not offer shoes, sandals, sports coats and jeans for sale on its website on the dates reviewed by Petitioner's counsel. (Amended Petition at ¶¶ 25, 35).

Registrant argues that the newly alleged facts fail to meet the Supreme Court's requirement that a claim "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). According to Registrant, the allegations regarding what it did not offer for sale at a certain sales outlet on a certain date is insufficient to state a claim of fraud as to its Combined Declaration made several years before, and thus the claim is not plausible. Of course evidence of what Registrant offered for sale at all times and through all sales outlets is necessarily in the control of Registrant and not Petitioner. Therefore, any personal investigation by Petitioner of any sales outlet at any specific point in time is subject to such an attack by Registrant. For this very reason, similar arguments have

been rejected by courts in addressing fraud claims where such essential information is uniquely with the other party. *See Exergen v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1330-31 (Fed. Cir. 2009) (information and belief pleading is permitted under Rule 9(b) when “essential information lies uniquely within another party's control” if the pleading “sets forth the specific facts upon which the belief is reasonably based.”); *Simonian v. Pfizer Inc.*, 2011 WL 780836 *2 (N.D. Ill.) (with essential information uniquely within the other party’s control, claimant asserted specific facts sufficiently in support of its information and belief allegations of fraud); *Brinkmeier v. Graco Children's Products Inc.*, 767 F. Supp.2d 488, 496 (D. Del. 2011) (same). Therefore, the facts of Petitioner’s personal investigation support a plausible claim of falsity in the Combined Declaration.

Additional facts ignored by Registrant further underscore that Petitioner’s claims as pled are plausible. First, it must be emphasized that Registrant provided no documentary proof, not even an affirmation of its principal, that it did in fact offer these listed goods for sale in compliance with its declarations in the Combined Declaration, *i.e.*, the essential information uniquely held by Registrant. It must be presumed that if Registrant could produce this proof, it would have done so at this stage of the proceeding to eliminate the claims prior to discovery. But it has not. Second, Registrant ignores Petitioner’s previous allegations of fraud already accepted by the TTAB, namely that Respondent committed fraud in its registration of the Mark by falsely declaring it knew of no other use of the Mark when in fact Registrant had been purchasing from Petitioner goods sold under the Mark for years prior to its registration. (Amended Petition at ¶¶ 12-13, 19-21). The allegations of prior fraud on the USPTO, clearly supplement the plausible contention that in addition to its registration application, Registrant’s Combined Declaration is also false.

Therefore, Petitioner has presented specific facts of fraud by Registrant on the USPTO that accepted as true, as they must be, are plausible on their face. Contrary to Registrant's arguments, the *Iqbal* decision clearly holds that it does not impose a "probability requirement" on the claimant's allegations, only a plausibility standard. *See Iqbal*, 556 U.S. at 678. *See also Exergen*, 575 F.3d at 1330-31 (applying a plausibility standard to review of fraud claims brought upon information and belief). With the essential information of whether Registrant's Combined Declaration is false ultimately in the possession of Registrant, at this pleading stage the Amended Petition fully meets the plausibility and particularity standards in restating Petitioner's fraud claims.

Registrant's Citations are Inapposite and
Do Not Provide a Basis for Denying Petitioner's Motion

Registrant's citations in opposition to Petitioner's Motion do not establish that Petitioner has failed to meet the TTAB's pleading requirements for the two restated fraud claims. Registrant cites to several cases to support its argument that Petitioner's amendment of its petition is futile, but none of the cases involve claims of fraud on the USPTO. In *Trek Bicycle Corp. v. Styletrek Limited*, 64 U.S.P.Q.2d 1540, 2001 WL 1869327 (TTAB 2001), the TTAB found the claimant was unable to plead an essential element of its dilution claim, clearly making amendment futile. *Trek Bicycle Corp.*, 2001 WL 1869327 at *3. In *Kemin Foods L.C. v. Pigmentos Vegetales Del Centro S.A.*, 464 F.3d 1339 (Fed. Cir. 2006), the court's determination of futility was based on the specific facts related to this patent infringement case, including prior judgments on the issues of invalidity and unenforceability of the patents at issue. *Id.* at 1353-54. Finally, Registrant's citation to *Themis Capital, LLC v. Democratic Republic of Congo*, 2013 WL 1687198 (S.D.N.Y.), is inapposite as the case addressed a proposed amendment of an affirmative defense to a breach of contract claim filed post discovery which the court found futile

in the face of an imminent summary judgment motion. *Id.* at *6. Here at the pre-discovery stage, as the elements of each claim are properly pled including the facts of personal investigation in support of the frauds, Petitioner's proposed amendments are not futile.

With regard to decisions addressing amended pleadings asserting fraud on the USPTO, Registrant presents no case denying the amendment in which the claimant alleges each element of the fraud and provides the facts underlying its personal investigation in support. Registrant in fact cites to *Caymus Vineyards v. Caymus Medical, Inc.*, 2013 WL 6665451 (TTAB), a post-*Iqbal* case in which the TTAB found that "[c]onstruing applicant's allegations so as to do justice and in the light most favorable to the applicant," the fraud allegations were sufficiently particular as "applicant alleges when and how the fraud allegedly occurred and the content of the false representation and identifies what was obtained by reason of the asserted fraud." *Id.* at *3 (permitting amendment of fraud pleading). Similarly, Petitioner's Motion cited to numerous TTAB decisions allowing amendments of fraud claims to state the particulars of the fraud, just as Petitioner has done in the Amended Petition. (*See* Motion at 6-8). Thereafter, Registrant refers to *Asian and Western Classics B.V. v. Selkow*, 92 U.S.P.Q.2d 1478 (TTAB2009), in which the Board found that petitioner's fraud allegations based on information and belief "were unsupported by any statement of facts providing the information upon which petitioner relies or the belief upon which the allegation is founded." *Id.* at 1479. But in contrast, Petitioner's Amended Petition does just that, reciting the particulars of Registrant's fraud, including its failure to offer shoes, sandals, sports coats and jeans for sale on its website, as well as its prior fraudulent declaration in its registration application despite its purchases over many years of Petitioner's goods sold under the Mark. (Amended Petition at ¶¶ 19-42).

Most egregious is Registrant's final argument that attempts to impose a Fed. R. Civ. P. Rule 26(g) discovery inquiry standard upon Petitioner to defeat the admission of its amended claims. However, Registrant cites to no case in support of the proposition that at this pre-discovery pleading stage, Petitioner must go beyond the heightened pleading requirements for fraud and establish that it has met the "reasonable inquiry" certification requirements imposed by Rule 26(g) as to all discovery. The only case Registrant cites for this added burden is *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.3d 1318 (Fed. Cir. 1990), which is clearly not on point. In *Micro Motion*, a patent litigant sought nonparty discovery from its competitors to establish its damages, and the court granted the nonparty's motion to quash the discovery demand for its "confidential business information." *Id.* at 1320. This case has no bearing on Petitioner's motion to amend its fraud claims, and certainly the many TTAB and federal cases addressing the dual requirements of Rules 9(b) and 15 on fraud claims do not reference Rule 26(g). Thus, Registrant's discovery standard arguments are a nullity and have no bearing on the Motion before the Board.

CONCLUSION

In conclusion, on the grounds presented in the Motion and herein, Petitioner respectfully requests of the TTAB leave to file the proposed Amended Petition realleging the facts in support of its claims for cancellation of Reg. '325 based upon fraud on the USPTO with regard to Registrant's Section 8 declaration and Section 15 declaration.

Dated: July 23, 2014
White Plains, N.Y.

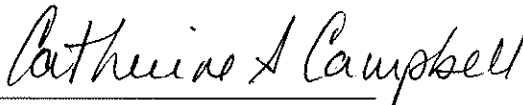
_____/s/_____

Catherine S. Campbell, Esq.
RAND ROSENZWEIG RADLEY & GORDON LLP
445 Hamilton Avenue, Suite 1201
White Plains, New York 10601
Tel: (914) 406-7000
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Petitioner's Reply to Registrant's Opposition to the Motion for Leave to File an Amended Petition to Cancel, dated July 23, 2014, as filed by Petitioner, Cockpit USA, Inc. with the TTAB was served on July 23, 2014 via email to counsel, Michael Sarney, Esq., for Registrant, Top Gun Intellectual Properties, Inc., per the prior agreement of the parties to this proceeding, at the following email address provided for such purpose:

msarney@moritthock.com


Catherine S. Campbell